87-503

Supreme Court, U.S.
FILED
SEP 14 1987
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term

VICTOR L. GANOE, THOMAS A. GANOE, EDWIN A. GANOE, DANIEL K. GANOE, SANDRA I. GANOE COLLAR, MARY GANOE PRICE, CHERIE GANOE LODESTRO and CLEO GANOE SMITH

Petitioners

vs.

WILLIAM LUMMIS, Temporary Administrator of the Estate of HOWARD ROBARD HUGHES, JR. and GEORGE F. NEFF, Independent Executor of the Estate of ANNETTE GANO LUMMIS

Respondents

Petition for the Writ of Certiorari to The Supreme Court of the State of New York, County of Erie

PETITION FOR WRIT OF CERTIORARI

Richard D. Grisanti, Esq.
Attorney for Petitioners
Office & P.O. Address
577 Niagara Street
Buffalo, New York 14201
(716)883-0400

36 pp

QUESTION PRESENTED

Whether the Court of Appeals, State of New York, wrongfully denied Petitioners application for Leave to Appeal where the Lower Courts dismissed the Complaint herein for lack of jurisdiction and violated Petitioners' rights under the 5th and 14th Amendments of the United States Constitution.

TABLE OF CONTENTS

1. Table of Authorities..... iv
2. Opinion Below..... 1
3. Jurisdiction..... 2
4. Provisions of Law Involved..... 3
5. Statement of the Case..... 4
6. Reasons for granting Writ..... 8
7. Conclusion..... 20
8. Proof of Service..... 21
9. Appendix A - Decision from Court of Appeals...
10. Appendix B - Hon. Theodore J. Kasler's Decision..

TABLE OF AUTHORITIES

Cases:

Helmi vs. Buckelin
229 NY 363.....12

DeConellis,
66 Misc. 2nd 882.....12

Laurenzano vs. Goldman,
1983, 96 AD 2nd 852, 465 UNS 2nd 7079.12

Keeton vs. Hustler Magazine, Inc.
1984 104 SC 1473.....13

Columbia Briargate Co. vs. First National Bank
1983, 713 F. 2nd 1052.....13

Hanson vs. Denckla
1958, 357 US 235, 254, 78 S. Ct. 1228, 1240.....14

Calder vs. Jones
1984 ____US____, 104 S. Ct. 1482.....14

Helicopters Nacionales de Columbia S.A. vs. Hall,
1984____US____, 104 S. Ct. 1868.....16

Agra Chemical Distributing Co. vs. Marion Laboratories, Inc.
D.C.N.Y. 1981, 523, F. Supp 699.....16

Merkel Associates, Inc. vs. Bellofoam Corporation
D.C.N.Y., 1977, 437 F. Supp. 612, 619.....17

Prentice vs. Demag Materials Handling Limited,
1981, 80 AD 2nd 741, 437 NYS 2nd, 173..17

Sybron Corporation vs. Wetzel,
1978, 46 NY 2nd 197.....18

Allen vs. Canadian General Electric Company,
1978, 65 AD, 2nd 39.....19

Porcello
85 AD 2nd 917, 4th Department.....19

McGowan
72 AD 2nd 75, 4th Department.....19

Rules

Section 2103(b)(2) CPLR..... 1

Section 3211 CPLR..... 6

Section 302 CPLR.....11

Section 302(a)91) CPLR.....17

Section 302(i)(ii)CPLR.....17

Section 302(a)(3) CPLR.....18

No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term

VICTOR L. GANOE, THOMAS A. GANOE,
EDWIN A. GANOE, DANIEL K. GANOE,
SANDRA I. GANOE COLLAR, MARY GANOE PRICE,
CHERIE GANOE LODESTRO and CLEO GANOE SMITH

Petitioners

vs.

WILLIAM LUMMIS, Temporary
Administrator of the Estate of HOWARD
ROBARD HUGHES, JR. and
GEORGE F. NEFF, Independent
Executor of the Estate of
ANNETTE GANO LUMMIS

Respondents

PETITION FOR WRIT OF CERTIORARI

The Petitioners herein respectfully pray that this Court grant a Petition for Writ of Certiorari seeking review of the Order of the Court of Appeals, State of New York, denying Petitioners application for Leave to Appeal to said Court entered in this action July 7, 1987, and mailed to Petitioners Attorney, post-marked said date, which under the New York State Civil Practice Law and Rules, Section 2103(b)(2) at five (5) days before the time to further act starts to run herein.

OPINIONS BELOW

The Court of appeals denied Leave to appeal on July 7, 1987, which in effect affirmed the opinion, decision and Order of the Supreme Court Appellate Division decisions (See Appendix A) the Supreme Court of New York State, County of Erie (See Appendix B)

JURISDICTION

This Court does have jurisdiction under the 5th and 14 Amendments to the United States Constitution.

The Court of Appeals for the State of New York erroneously denied Leave to Appeal in its decision of July 7, 1987, in effect, affirming the decision of the Supreme Court, Appellate Division, Fourth Department which found a lack of jurisdiction herein. By so doing, the Court denied the Petitioners their right to "due process."

PROVISIONS OF LAW INVOLVED

United States Constitution - Amendment 5

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

United States Constitution - Amendment 14

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The Order of the Court of Appeal and State of New York and Supreme Court Appellate Division Fourth Department are erroneous.

The within action was commenced on or about July 30, 1985, by service of the Summons and Complaint herein (Record, pages 8-12). The action was brought in Supreme Court, County of Erie and alleged two causes of action. One, for fraud on the grounds that the Plaintiffs-Petitioners had the right to expect that all of the estate proceedings that were carried on since the death of Howard R. Hughes, Jr., on April 5, 1976, would be conducted in Harris County, Probate Court No. 2 and in Clark County Probate Court, fairly, impartially, above-board and pursuant to the Rules, Statutes and Laws of the State of Texas and the State of Nevada; that, unbeknown to Plaintiffs and many others there was a secret and conspiratorial agreement executed between the Defendants, the Court itself and various attorneys which predetermined how the heirship hearings which took place in 1981 and 1983, some five to seven years after

the execution of this agreement, would be determined. The first cause of action also alleges certain other agreements were entered into, also secret, which provided for remuneration to various attorneys from the Defendants at the same time that said attorneys were representing clients during the heirship hearings in opposition to the position supported by the said Defendants herein. Further said cause of action alleges numerous misrepresentations by the Defendants, the Court, the Attorneys for the Defendants and others that the Estate would be divided pursuant to Texas Law when such representations were utterly false.

The second cause of actions alleges negligence on the part of the Defendants and acts of misfeasance, malfeasance and non-feasance in the administration of the Estate in relation to the marshalling of the assets, the accounting thereof and with the regards to the heirship determinations. It is alleged in said cause of action that the Defendants stated the Estate was worth $468,000,000.00, when actually the said Estate is worth, not millions, but billions of dollars. The Second

cause of action also alleges negligence in the failure to notify the Plaintiffs of the heirship hearings in both 1981 and 1983.

The issues involved herein were never litigated in any other action herein by any Court in this Country, nor in the States of Texas or Nevada.

The Defendants-Respondents made a motion upon various grounds under Section 3211 of the CPLR on September 4, 1985, on May 29, 1986, the Lower Court ruled in its decision that the Decedent was a non-domiciliary of the State of New York, did not own any real or personal property or other assets in the State of New York and that his Estate was administered in a foreign forum by fiduciaries appointed or acting on behalf of the Estate in that same forum and not in New York. Thus, the Lower Court concluded that there is absolutely nothing to connect the Courts at this date with the foreign administration of said Estate. The Court then denied all other motions herein, including one for sanctions which portion of the ruling Defendant-Respondent has cross-appealed.

The Court also denied a cross-motion by Plaintiffs-Petitioners herein for summary judgment which Counsel submits was also error herein.

That the question of jurisdiction was argued in the Court of original instance and said Court dismissed the Complaint for lack thereof. (Appendix B)

The Supreme Court Appellate Division, Fourth Department affirmed such dismissal and the Court of Appeals, State of New York denied Leave to Appeal.

Petitioners contend that all of said Courts are depriving Petitioners the right to "due process."

REASONS FOR GRANTING THE WRIT

A. There has been a complete denial of Due Process.

Petitioners claim that the New York Courts have denied them "due process" of law by dismissing their complaint on the grounds that the Court lacked jurisdiction over "subject matter" as well as "in personum."

After citing various cases in his decision, Justice Theodore S. Kasler ruled that the Supreme Court of Erie County lacked subject matter jurisdiction to entertain the causes of action alleged in the Complaint basing same on the following reasoning:

1. That Howard R. Hughes, Jr. died a non-domiciliary of the State of New York.

2. That he did not own any real or personal property or other assets in the State of New York.

3. His Estate was administered in a foreign forum by fiduciaries appointed or acting on behalf of the Estate in that same forum and not in New York.

Based upon those factors alone, the Lower Court ruled that there is "absolutely nothing to connect the Courts of this State with the foreign administration of the Estate of Howard R. Hughes, Jr." (Record, Pages 525 - 526).

The affidavits of WILLIAM A. JONES, of Houston, Texas (now a resident of Nashville, Tennessee), who was an investigator employed by approximately 300 heirs on the paternal side of the family, and who was, not only involved all during the administration of this Estate from the very time that Howard R. Hughes, Jr. died, April 5, 1976 to date, but was also present during all of the heirship proceedings (Record, Pages 334 6 342) demonstrate that there is jurisdiction in New York State. Also, the affidavit of Robert Hughes who is a second cousin to the Decedent and who acted as agent for 184 other paternal heirs and who also had acted as such from the very time of Decedent's death to the present time and also attended the heirship hearings (Record, pgs. 343-347) supports jurisdiction here. Counsel's affidavit which contained numerous documents and exhibits was submitted to the Lower Court indicating

that the Decedent did and does now own property and assets in the State of New York, not only at the time of his death but to the present time; that said Exhibits also demonstrate that Decedent, as well as the Defendant-Respondent have been "doing business" in the State of New York and continues to do so, all of which confers jurisdiction in the Lower Court. (Record, pgs. 348 - 390).

Can anyone with the mass accumulation of wealth and assets scattered throughout the world which belonged to the Decedent and now belongs to his Representative, Defendant-Respondent do any business without "funneling" such transactions through New York City, the financial capital of the world? The said exhibits herein speak for themselves as far as the jurisdictional issue is concerned.

Based upon such exhibits, as well as the law relating to Section 302 of the CPLR, there are more than "sufficient contacts" between the Defendant-Respondent and the State of New York to confer jurisdiction upon our Courts.

Section 302 CPLR provides, in part, as follows:

a] Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a Court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:

1. transacts <u>any</u> business within the state or contracts <u>anywhere</u> to supply goods or services in the state; or

2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or

3. <u>commits a tortious act without the state causing injury to a person or property within the state,</u> except as to a cause of action for defamation of character arising from the act, if he

(i) regularly does or solicit business, or engages in any other persistent course of conduct, or derives substantial revenue from goods or consumed or services rendered, in the state, or

(ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or

4. owns, uses or possesses real property situate within the state.

First, opposing Counsel argued in the Lower Court that because the Defendant-Respondent is a fiduciary, he is not liable for the acts or his principal, who in this case would be Howard R. Hughes, Jr., Decedent; and he cited a 1920 case **Helmi vs. Buckelin,** 229 NY 363, as well as a 1971 Surrogate Court In Re; **De Conellis,** 66 Misc. 2nd 882; since that ime, the "fiduciary shield doctrine" has been embodied in much more recent cases and Higher Court rulings.

The Court in **Laurenzano vs. Goldman,** 1983, 96 AD 2nd, 852, 465 UNS 2nd 7079, ignored the doctrine, stating:

"The fiduciary shield doctrine is both equitable and flexible; where the Complaint alleges a violation of fiduciary duties, the doctrine will not automatically be applied to bar the acquisition of personal jurisdiction..."

That further, the Supreme Court of the United States, in **Keeton vs. Hustler Magazine, Inc.,** 1984, 104 Supreme Court 1473 also ruled against the doctrine in strong language, by stating:

"We today reject the suggestion that employees who act in their official capacity are somehow shielded from suit in their individual capacity."

And in **Columbia Briargate Co. vs. First National Bank,** 1983, 713 F. 2nd 1052, the Federal Court stated:

"It does not appear logical or reasonable or even to comport with the legislative philosophy inherent in the long arm statutory procedure itself to hold that one may be held liable substantively for a tort he commited in his fiduciary role, in the forum state, but the Court of the forum state may not under its long arm statute require him to appear and Defendant for the suit arising out of that tort, in the forum state."

It is interesting to note that in the Keeton case (supra) a New York resident was allowed to sue Hustler in New Hampshire, even though it was clear to everyone that the only reason was because it had a longer statute of limitations on libel claims; that the only contact with New Hampshire consisted of the sale of 10,000 to 15,000 copies of the magazine in said state.

In McKinney's, Section 302, Supplementary Practice Commentaries, by Joseph M. McLaughlin, it was stated:

"While the defendant's activities in New Hampshire might not constitute "doing business" to support jurisdiction over a claim unrelated to the business, Hustler Magazine were sufficient to permit jurisdiction in a libel action based on the contents of the magazine published in New Hampshire. No matter what forum the plaintiff selected, she could obtain only one damage award for all injury to her reputation suffered in all jurisdictions."

"The fact that the statute of limitations on a libel claim might have expired in every jurisdiction other than New Hampshire was irrelevant to the jurisdictional calculus because, as the Court had noted on an earlier occasion, "the issue is personal jurisdiction, not choice of law." **Hanson vs. Denckla,** 1958, 357 US 235, 254, 78 S. Ct. 1228, 1240. Thus, jurisdictional inquiries should not be distorted by choice of law concerns."

"Finally, the fact that plaintiff was a resident of New York, not New Hampshire, while perhaps relevant, did not compel a finding of no jurisdiction. As the Court wrote, "we have not to date required permission to that State to assert personal jurisdiction over a nonresident defendant." 104 S. Ct. at 1480-81.

In a companion case, **Calder vs. Jones,** 1984,____ US_____, 104 S. Ct. 1482, the court permitted the well-known actress, Shirley Jones, to sue in California, where the plaintiff resides. While it is clear that the Enquirer is subject to jurisdiction in California, the individual defendants argued that they lacked the requisite "contracts" with California since the defamatory publication had been written and edited in Florida.

The Defendants argued that suit in California would have a "chilling effect" upon reporters and editors. The Court, however, refused the permit First Amendment considerations to muddle the jurisdictional argument.

> "The potential chill on protected First Amendment activity stemming from libel and defamation actions is already taken into account in the constitutional limitations on the substantive law govening such suits...To reintroduce those concerns at the jurisdictional stage would be a form of double counting." 104 S. Ct. at 1488.

Jurisdictional problems in defamation cases are analyzed as in other tort cases. Under an orthodox long-arm jurisdiction analysis, the defendants were subject to "in personam" jurisdiction. The defendants intended to and in fact did cause tortious injury to Miss Jones in California. To quote the Court:

> "An individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly cause the injury in California." 104 S. Ct. at 1487.

That these decisions do not herald the demise of all territorial limitations upon personal jurisdition became evident one month later. In **Helicopters**

Nacionales de Columbia, S.A. vs. Hall, 1984, ____US____, 104 S. Ct. 1868, the Court refused to sustain jurisdiction over a Columbian corporation with its principal place of business in the city of Bogata, Columbia. Four Americans were killed in a helicopter crash in Peru. Their survivors sought to sue the Columbian helicopter owner in Texas.

Parsing the contacts between the Columbian corporation and the State of Texas, the Supreme Court held that they were too few to support jurisdiction. The plaintiffs also made the interesting argument that if they could not sue in Texas, then, as a practical matter, they could not sue at all and, accordingly, there should be "jurisdiction by necessity." The Court ducked that issue:

> "We decline to consider adoption of a doctrine of jurisdiction by existing law in the absence of a more complete record." 104 S. Ct. at 1874, n. 13.

Further, many federal cases have held that the "fiduciary shield doctrine," is inapplicable when it comes to tortous conduct:

See **Agra Chemical Distributing Co. vs. Marion Laboratories, Inc.,** D.C.N.Y. 1981, 523, F. Supp. 699;

Merkel Associates, Inc. vs. Bellofram Corp., D.C.N.Y. 1977, 437 F. Supp. 612, 619. The Second Circuit, however, has dismissed these cases as not expressing "the prevailing view," and in the Miller case, supra, would have extended the immunity to the defendant in a tort case, but for the fact that it had decided to pierce the corporate veil."

That at any rate, Counsel submitted the exhibits and documents in the Lower Court, which showed that we have met the jurisdictional compliance with CPLR 302 (a)(1) and (3)(i)(ii); and further, that the cases indicate that very minimal "contacts" are required for the Court to obtain jurisdiction under the long-arm statute.

In the case of **Prentice vs. Demag Materials Handling Limited,** 1981, 80 AD 2nd 741, 437 NYS 2nd 173 this Court sustained jurisdiction holding that the defendant should reasonably have expected the consequences in New York, and was also deriving substantial revenue from interstate or international commerce. This is exactly what our contention is all about.

In the case at hand, the said Defendant-Respondent knew that there were alleged heirs who were residents of the County of Erie and State of New York, because of the fact that claims were filed way back in 1976 and Counsel has received official Court documents ever since that date to the present time and, therefore, the Defendant-Respondent should "reasonably have expected" that "consequences" would have occured in New York State damaging and injuring the Plaintiffs-Petitioners herein, as a result of the commission of fraud and negligence; that, further, it is common knowledge, as well as specifically alleged in the Affidavits of Williams Jones and Robert Hughes that the said Defendant-Respondent has been and are still deriving substantial revenue from interstate or international commerce.

In the case of **Sybron Corporation vs. Wetzel,** 1978, 46 NY 2nd 197 the Court of Appeals ruled under CPLR 302(a)(3) that the New York Court had jurisdiction regarding a tortious act in New Jersey, which caused injury to a party in New York.

In **Allen vs. Canadian General Electric Company,** 1978, 65 AD, 2nd 39 the Appellate Division, upheld jurisdiction even though the Defendant never entered the State, but committed a tortious act outside New York that caused injury to the Plaintiff in this State.

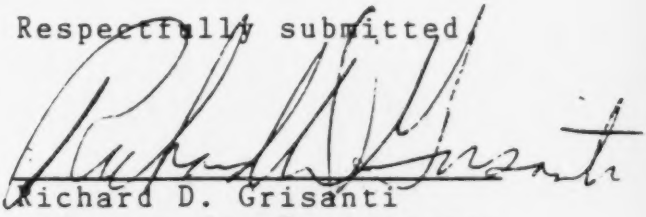
In the Porcello case, cited by opposing Counsel, 85 AD 2nd 917, 4th Department, there was no injury in New York and in the McGowan case, 72 AD 2nd 75, 4th Department, also cited by opposing Counsel, there were absolutely no "contacts" whatsoever and the Court held that there must be an injury in New York.

In the affidavits of Robert Hughes and William A. Jones, a few of the "contacts" are set forth, including the continuing contract for approximately $1,000,000.00 per year with Merrill Lynch in the State of New York, the activities of Hughes Television Network, Inc., also based in the City of New York, the transactions with stocks involving TWA, Summa Corporation, and other corporations being handled in the City of New York by various brokers, one of which is Solomon and Sons.

CONCLUSION

Petitioner respectfully submits that this is a case that is proper for review by Certiorari to the Supreme Court of the United States and they pray that the Petition for Writ of Certiorari be granted.

Respectfully submitted,



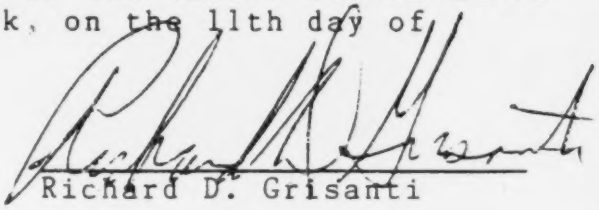
Richard D. Grisanti
Attorney for Petitioners
Office & P.O. Address
577 Niagara Street
Buffalo, New York 14201
(716)883-0400

PROOF OF SERVICE

Richard D. Grisanti, Esq., deposes and states that pursuant to Rule 28.3 of this Court he served this Petitition for Writ of Certiorari on Defendant-Respondent by enclosing three copies of each thereof in an envelope, certified mail return receipt requested, addressed to:

Alexander C. Cordes, of Counsel
PHILLIPS, LYTLE, HITCHCOCK, BLAINE & HUBER
Attorneys for Defendant-Respondent
Office & P.O. Address
3400 Marine Midland Center
Buffalo, New York 14230
(716)847-7036

and depositing same in the United States mails at Buffalo, New York, on the 11th day of September, 1987.



Richard D. Grisanti

APPENDIX A

4-10 Mo. No. 604

Victor L. Ganoe, et al.,
Appellants,

vs.

William Lummis, Temporary Administrator of the Estate of Howard Robard Hughes, Jr., et al.,
Respondents

Motion for leave to appeal denied with twenty dollars costs and necessary reproduction disbursements.

DECISION COURT OF APPEALS
July 7, 1987

"284. (Erie Co.),—Victor L. Ganoe, Thomas A. Ganoe, Edwin A. Ganoe, Daniel K. Ganoe, Sandra I. Ganoe Collar, Mary C. Ganoe Price, Cherrie Ganoe Lo Destro and Cleo Ganoe Smith, Appellants-Respondents, vs. William Lummis, Temporary Administrator of the Estate of Howard Robard Hughes, Jr. and George F. Neff, Independent Executor of the Estate of Annette Gano Lummis, Respondents-Appellants. - Order unanimously affirmed with costs, in accordance with the following Memorandum: Defendants moved to dismiss the complaint upon various grounds under CPLR 3211. The court granted the motion, stating that it lacked jurisdiction over the subject matter of the action. The complaint alleges fraud and negligence in the administration of the estate of Howard R. Hughes, Jr. Even if the court had subject matter jurisdiction to entertain this action, the complaint was properly dismissed since it fails to state a cause of action. Plaintiffs have not alleged that they are distributees of the estate or that they have any other interest therein. In fact, they unsuccessfully litigated that issue in the Texas courts

and exhausted their rights on appeal when the United States Supreme Court denied certiorari (Ganoe v. Neff,____US____,90 L Ed696,[decided May 27, 1986]). Lacking any interest in the estate, plaintiffs can claim neither damage nor breach of duty owing to them by reason of any fraud or negligence in its administration. (Appeal from Order of Supreme Court, Erie County, Kasler, J. -- Summary Judgment.) Present: Denman, J.P., Boomer, Pine, Balio, Davis, JJ.

APPENDIX B

At a Special Term of the Supreme Court held in and for the County of Erie at the Erie County Courthouse, Buffalo, New York, on the 18th day of September, 1985.

PRESENT: HON. THEODORE S. KASLER, J.S.C.
Justice Presiding

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

VICTOR L. GANOE, THOMAS A. GANOE, EDWIN A. GANOE, DANIEL K. GANOE, SANDRA I. GANOE COLLAR, MARY G. GANOE PRICE, CHERIE GANOE LO DESTRO, and CLEO GANOE SMITH

Plaintiffs

vs.

ORDER

WILLIAM LUMMIS, Temporary Administrator of the Estate of HOWARD ROBARD HUGHES, JR. and GEORGE F. NEFF, Independent Executor of the Estate of ANNETTE GANO LUMMIS

Index No. H-58168

Defendants

Defendants haveing moved for an order pursuant to CPLR 3211(a)(1),(2),(3),(4),(5),(7) and (8) dismissing the complaint and for an order requiring the payment of defendants' attorney's fees to be assessed against plaintiffs and their counsel, and plaintiffs having cross-moved for an order pursuant to CPLR 3211

and 3212 granting partial summary judgment; and the motion and cross-motion having regularly come on to be heard at a Special Term of this Court held at the Erie County Courthouse, Buffalo, New York on September 18, 1985.

NOW, upon the reading and filing of the defendants notice of motion dated August 23, 1985 and annexed affidavits of William R. Lummis sworn to August 2, 1985, George F. Neff sworn to August 17, 1985, Thomas L. Schubert sworn to August 20, 1985 and Alexander C. Cordes sworn to August 23, 1985 and accompanying exhibits submitted in support of defendants' motions to dismiss and for sanctions; the reply affidavit of Alexander C. Cordes sworn to September 17, 1985 and exhibit attached thereto; the reply affidavit of Thomas L. Schubert sworn to October 14, 1985 and exhibits attached thereto; and the three reply affidavits of William T. Miller sworn to October 11, 1985 and exhibits attached thereto; the supplemental affidavit of Thomas L. Schubert sworn to March 14, 1986 and exhibits attached thereto; all in support of the motion and in opposition to the cross-motion; plaintiffs' notice of cross-motion; the two affidavits of Richard

D. Grisanti sworn to September 12, 1985 and exhibits attached thereto; the affidavit of William A. Jones sworn to September 17, 1985 and exhibit attached thereto; the affidavit of Robert Hughes sworn to September 18, 1985; and the affidavit of Richard D. Grisanti sworn to October 3, 1985 and exhibits attached thereto; all in support of plaintiffs cross-motion and in opposition to defendants' motion; and after hearing Phillips, Lytle, Hitchcock, Blain & Huber (Alexander C. Cordes, of Counsel), attorneys for defendants, in support of defendants' motion and in opposition to plaintiffs' cross-motion, and Richard D. Grisanti, Esq., attorney for plaintiffs, in support of plaintiffs' cross-motion and in opposition to defendants' motion; and due deliberation having been had thereon, and upon this Court's memorandum decision dated May 29, 1986, it is

ORDERED, that defendants' motion to dismiss the complaint is granted, and it is further

ORDERED, that the Clerk of the Court enter judgment in favor of defendants dismissing the complaint, and it is further

D. Grisanti sworn to September 12, 1985 and exhibits attached thereto; the affidavit of William A. Jones sworn to September 17, 1985 and exhibit attached thereto; the affidavit of Robert Hughes sworn to September 18, 1985; and the affidavit of Richard D. Grisanti sworn to October 3, 1985 and exhibits attached thereto; all in support of plaintiffs cross-motion and in opposition to defendants' motion; and after hearing Phillips, Lytle, Hitchcock, Blain & Huber (Alexander C. Cordes, of Counsel), attorneys for defendants, in support of defendants' motion and in opposition to plaintiffs' cross-motion, and Richard D. Grisanti, Esq., attorney for plaintiffs, in support of plaintiffs' cross-motion and in opposition to defendants' motion; and due deliberation having been had thereon, and upon this Court's memorandum decision dated May 29, 1986, it is

ORDERED, that defendants' motion to dismiss the complaint is granted, and it is further

ORDERED, that the Clerk of the Court enter judgment in favor of defendants dismissing the complaint, and it is further

ORDERED, that defendants' motion for a order requiring payment of defendants' attorney's fees to be assessed against plaintiffs and their counsel is denied, and it is further

ORDERED, that plaintiffs' cross-motion is denied.

s/Theodore S. Kasler
THEODORE S. KASLER, J.S.C.

GRANTED
June 23, 1986

s/Gregory Joseph
Court Clerk

Supreme Court, U.S.
FILED
OCT 10 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-503

IN THE

Supreme Court of the United States

October Term, 1987

VICTOR L. GANOE, THOMAS A. GANOE,
EDWIN A. GANOE, DANIEL K. GANOE,
SANDRA I. GANOE COLLAR, MARY GANOE PRICE,
CHERRIE GANOE LO DESTRO and CLEO GANOE SMITH,
Petitioners,

vs.

WILLIAM LUMMIS, Temporary Administrator
of the Estate of
HOWARD ROBARD HUGHES, JR.
and
GEORGE F. NEFF, Independent Executor
of the Estate of
ANNETTE GANO LUMMIS,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FOURTH DEPARTMENT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ALEXANDER C. CORDES, ESQ.
PHILLIPS, LYTLE, HITCHCOCK,
BLAINE & HUBER
Attorneys for Respondents
3400 Marine Midland Center
Buffalo, New York 14203
(716) 847-7036

Batavia Times Publishing Co.
Batavia, N.Y. (716) 344-2000

Question Presented

Whether New York Supreme Court, Appellate Division, Fourth Department, denied Petitioners any rights under the Fifth and Fourteenth Amendments of the United States Constitution by affirming the dismissal of Petitioners' complaint because of lack of subject matter jurisdiction and a failure to state a cause of action?

TABLE OF CONTENTS.

	Page
Question Presented	i
Table of Authorities	ii
Opinions Below	2
Jurisdiction	2
Provisions of Law Involved	3
Statement of the Case	4
Reasons for Denying the Writ	7
A. Dismissal of the Complaint was Proper for Lack of Subject Matter Jurisdiction	7
B. Dismissal of the Complaint was Proper Because Petitioners Lack any Interest in the Hughes Estate	8
Conclusion	10
Appendix A—Opinion of New York Supreme Court, Special Term, Erie County	1a

TABLE OF AUTHORITIES.

Cases:

A.G. Ship Maintenance v. Lezak, 69 N.Y.2d 1 (1986)	5
Ganoe v. Neff, _____ U.S. _____, 90 L. Ed. 2d 696 (1986)	6

Other Authorities:

New York Civil Practice Law and Rules, Rule 3211(a)	3,4
Rules of the Supreme Court of the United States, Rule 21(h)	2

IN THE

Supreme Court of the United States

October Term, 1987

No. 87-503

VICTOR L. GANOE, THOMAS A. GANOE, EDWIN A. GANOE, DANIEL K. GANOE, SANDRA I. GANOE COLLAR, MARY GANOE PRICE, CHERRIE GANOE LO DESTRO and CLEO GANOE SMITH,

Petitioners,

vs.

WILLIAM LUMMIS, Temporary Administrator of the Estate of HOWARD ROBARD HUGHES, JR. and GEORGE F. NEFF, Independent Executor of the Estate of ANNETTE GANO LUMMIS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FOURTH DEPARTMENT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondents respectfully pray that this Court deny the Petition for Writ of Certiorari seeking review of the judgment of the Supreme Court of the State of New York, Appellate Division, Fourth Department, dismissing Petitioners' complaint.

Opinions Below

On May 29, 1986, the New York Supreme Court, Special Term, Erie County dismissed Petitioners' complaint[1]. Petitioners appealed to the New York Supreme Court, Appellate Division, Fourth Department. That court unanimously affirmed dismissal of Petitioners' complaint both for want of subject matter jurisdiction and failure to state a cause of action. 129 A.D.2d 1006 (4th Dep't). Petitioners then sought review by the New York Court of Appeals; however, on July 7, 1987, the New York Court of Appeals denied Petitioners' Motion for Leave to Appeal. 70 N.Y.2d 602 (1987).

Jurisdiction

No federal question, let alone, a substantial question, was decided in the state court proceedings. In this connection, it is significant that Petitioners wholly fail to comply with Rule 21(h) of this Court.

---

[1] Petitioners failed to append a copy of Special Term's decision. It is attached as Appendix A.

Provisions of Law Involved

New York Civil Practice Law and Rules

R. 3211. Motion to dismiss.

(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

. . . .

2. the court has not jurisdiction of the subject matter of the cause of action; or

. . . .

7. the pleading fails to state a cause of action . . . .

. . . .

Statement of the Case

Petitioners, who claim to be maternal seventh cousins of Howard R. Hughes, Jr., sought by their complaint filed in New York Supreme Court, Erie County, to circumvent the courts of Texas and obtain a share of his intestate estate, despite the fact that (i) they had not pleaded they were his intestate distributees, (ii) admitted they were not and (iii) had been finally determined not to be such intestate distributees by the courts of Texas, the state having jurisdiction of the probate of his estate.

Respondents moved to dismiss the complaint under New York Civil Practice Law and Rules, Rule 3211(a) for lack of subject matter jurisdiction, failure to state a cause of action and on other grounds. Respondents also moved for sanctions against Petitioners and their counsel for commencing frivolous litigation. Special Term granted Respondents' motion to dismiss the complaint, basing its decision specifically on lack of subject matter jurisdiction, but declined to award sanctions. The court stated:

> Howard R. Hughes, Jr. died a non domiciliary of the State of New York without owning any real or personal property or other assets in the State of New York. His estate was administered in a foreign forum by fiduciaries appointed or acting on behalf of the estate in that same forum and not in New York. Simply put, as urged by defendants, there is absolutely *nothing* to connect the courts of this state with the foreign administration of the estate of Howard R. Hughes, Jr.

Petitioners appealed the dismissal of their complaint and Respondents cross-appealed the denial of sanctions to the Appellate Division, Fourth Department.[2]

In unanimously affirming the dismissal of the complaint, the Appellate Division observed:

> Even if the court had subject matter jurisdiction to entertain this action, the complaint was properly dismissed since it fails to state a cause of action. Plaintiffs have not alleged that they are distributees of the estate or that they have any other interest therein. In fact, they unsuccessfully litigated that issue in the Texas courts and exhausted their rights on appeal when the United States Supreme Court denied certiorari (Ganoe v. Neff, _____ U.S. _____, 90 L. Ed. 2d 696 [decided May 27, 1986]). Lacking any interest in the estate, plaintiffs can claim neither damage nor breach of duty owing to them by reason of any fraud or negligence in its administration.

129 A.D.2d 1006-7.

On July 7, 1987, the New York Court of Appeals denied Petitioners' motion for leave to appeal. 70 N.Y.2d 602.

The record consists principally of the papers evidencing the controlling proceedings in the Texas courts.

---

[2] In *A.G. Ship Maintenance v. Lezak*, 69 N.Y.2d 1 (1986), announced after Respondents had filed their notice of cross-appeal, the New York Court of Appeals ruled that sanctions for frivolous actions could not be imposed if at the time of instituting the action neither a statute nor court rule authorized their imposition. Because there was no such statute or rule in effect when this action was instituted, Respondents did not press their request for sanctions in the Appellate Division and that court did not address the issue.

The Texas probate court, by a judgment dated April 10, 1978, determined that Mr. Hughes died intestate on April 5, 1976, a domiciliary of Texas (R. 46-47[3]). Because the estate had no real or tangible personal property in New York (R. 50-104), no proceedings for ancillary administration were commenced in New York. On November 13, 1981, the Texas probate court entered a final judgment determining that only descendents of the grandparents of Mr. Hughes were entitled to share in his estate (R. 113-121). Papers filed by some of the Petitioners showed that they and Mr. Hughes were, at best, eight generations removed from any alleged common ancestor (R. 147-153). Nevertheless, Petitioners sought to reopen the heirship proceedings and set aside the final judgment. On August 30, 1985, the Texas probate court granted summary judgment dismissing Petitioners' claims (R. 327-331), after which their appeals to the Court of Appeals for the First Supreme Judicial District of Texas and the Supreme Court of Texas were dismissed (R. 518-522). A petition for a writ of certiorari was denied by this Court on May 27, 1986. *Ganoe v. Neff*, _____ U.S. _____, 90 L. Ed. 2d 696 (1986).

[3] "R" refers to pages of the Record on Appeal in the Appellate Division.

REASONS FOR DENYING THE WRIT

This case was dismissed at Special Term for lack of subject matter jurisdiction and the dismissal was unanimously affirmed by the Appellate Division. That court also observed that the complaint failed to state a cause of action. It follows that the only conceivable question for review is whether the New York state courts, in disposing of the case on those two grounds, denied Petitioners due process. Petitioners totally fail to address those grounds. Instead, their Petition is largely given over to an irrelevant discussion of *in personam* jurisdiction (Pet. 10-19) which, as it happens, is an additional ground for dismissal not even reached by the state courts.

A. Dismissal of the Complaint was Proper for Lack of Subject Matter Jurisdiction.

Petitioners' Argument (Pet. 9-10) comes down to a factual contention that the Hughes estate owned property in New York and is "doing business" in New York. But Special Term found specifically that the Hughes estate owned no property in New York and that the courts of New York have no connection with the estate. The Appellate Division affirmed. These findings independently support their holdings that the New York courts have no subject matter jurisdiction over the Hughes estate.

Subject matter jurisdiction of this estate lies in Texas. Petitioners failed at Special Term, failed in the Appellate Division and still fail to offer any reason or authority why a New York court should involve itself in the heirship and administration of a foreign estate. Of controlling significance, however, Petitioners fail to explain here and never suggested to the New York courts why their refusal to so involve themselves denied Petitioners due process.

B. Dismissal of the Complaint was Proper Because Petitioners Lack any Interest in the Hughes Estate.

Dismissal of the complaint was also required because of the plain lack of merit of Petitioners' complaint since it did not even allege that Petitioners were intestate distributees of Mr. Hughes. The most specific allegation in the complaint of any relationship between Petitioners and Mr. Hughes is the first paragraph: ". . . Plaintiffs were and still are residents of the County of Erie and State of New York and close relatives of Howard Robard Hughes, Jr." In fact, Petitioners admitted they were not intestate distributees and the courts of Texas held they were not. The Appellate Division found specifically that Petitioners lack any interest in the Hughes estate. This finding independently supports its holding that Petitioners' complaint failed to state a cause of action. Although Petitioners' claims are cloaked in the florid language of fraud and negligence, they all depend on a non-existent relationship to Mr. Hughes—one that would entitle them to some distribution from his estate. If they are relatives, they are far too remote to have any complaint concerning the way the Hughes estate was administered. Even assuming "a secret and conspiratorial agreement" (Pet. 4)[4] (an absurd

[4] There were no secret agreements—they have been on file in Texas for more than ten years. They were executed, as their terms make clear, to eliminate questions about Mr. Hughes' possible domicile in Mexico, the Bahamas, England, Nicaragua, Canada, Nevada, Texas and California and their differing laws of succession, descent and distribution. They could be amended, and were in fact, amended, to include additional persons who established legitimate heirship. Thus, the agreements reallocated among the judicially determined heirs the shares they were entitled to receive in any event. Such agreements were no fraud upon anyone—most notably not upon Petitioners or any other strangers to the real Hughes heirs (R. 435-517).

assumption belied by the entire record of the Texas proceedings which were conducted with scrupulous regard for the rights of any person claiming an interest in the Hughes estate), Petitioners, if they are related at all, are, at best, seventh cousins and have no standing to question those proceedings. Mr. Hughes left surviving numerous first cousins and an aunt on the maternal side. It follows that Respondents owed Petitioners no duty and Petitioners sustained no damage from any of Respondents' alleged acts. The Petition is totally silent on this dispositive point.

Conclusion

Respondents respectfully submit that this case is not a proper one for review by certiorari in the Supreme Court of the United States, and Respondents pray that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

ALEXANDER C. CORDES, ESQ.
PHILLIPS, LYTLE, HITCHCOCK,
BLAINE & HUBER
3400 Marine Midland Center
Buffalo, New York 14203
(716) 847-7036

Attorneys for Respondents
William Lummis, Temporary
Administrator of the Estate
of Howard Robard Hughes, Jr.
and George F. Neff, Independent
Executor of the Estate of
Annette Gano Lummis

APPENDIX A

Opinion of New York Supreme Court, Special Term, Erie County

STATE OF NEW YORK
SUPREME COURT
County of Erie

VICTOR L. GANOE, THOMAS A. GANOE, EDWIN A. GANOE, DANIEL K. GANOE, SANDRA I. GANOE COLLAR, MARY G. GANOE PRICE, CHERRIE GANOE LO DESTRO, and CLEO GANOE SMITH,

Plaintiffs,

vs.

WILLIAM LUMMIS, Temporary Administrator of the Estate of HOWARD ROBARD HUGHES, JR. and GEORGE F. NEFF, Independent Executor of the Estate of ANNETTE GANO LUMMIS,

Defendants.

RICHARD D. GRISANTI
for Plaintiffs

PHILIPS, LYTLE, HITCHCOCK, BLAINE & HUBER (ALEXANDER C. CORDES, of counsel)
for Defendants

Appendix A—Opinion of New York Supreme Court, Special Term, Erie County.

MEMORANDUM

KASLER, J.

Motion to dismiss plaintiffs' complaint pursuant to CPLR §3211, subd [a], paragraph 2, is hereby granted. Plaintiffs, the self proclaimed "close relatives" of billionaire recluse Howard R. Hughes, Jr., have commenced suit in this forum seeking injunctive and monetary relief against defendants as fiduciaries of the Hughes estate upon the grounds of alleged fraud and negligence in connection with the heirship determination and administration, including settlement agreements, of the Hughes estate by and within the state courts of foreign jurisdictions.

Defendants, citing numerous grounds, only one of which will be discussed inasmuch as it will be dispositive of the motion before the court, have moved for dismissal of plaintiffs' complaint and the imposition of sanctions. In response, plaintiffs have opposed defendants' motion and cross moved for partial summary judgment.

CPLR 3211, subd [a], provides for a motion to dismiss one or more causes of action upon the ground that "the court has not jurisdiction of the subject matter of the cause of action" (para 2). Subject matter jurisdiction has been defined as the "power to adjudge concerning the general question involved, and is not dependent upon the state of facts which may appear in a particular case, arising, or which is claimed to have arisen, under that general question." *Hunt v Hunt*, 72 NY 217, 229. A distinction must be drawn between a court's competence to entertain an action and its power to render a judgment on the merits. Absence of the former deprives

the court of subject matter jurisdiction; absence of the latter to reach the merits does not. (*Lacks v Lacks*, 41 NY2d 71, 75). Subject matter does not mean "this case" but "this kind of case", (*Matter of Rougeron*, 17 NY2d 264, 271), and it had been said by no less an authority than former Chief Justice Breitel that "a statement that a court lacks 'jurisdiction' to decide a case may, in reality, mean that elements of a cause of action are absent (citation omitted)." *Lacks v Lacks, supra*, p 74.

With respect to plaintiffs' claims the result should be evident. Howard R. Hughes, Jr. died a non domiciliary of the State of New York without owning any real or personal property or other assets in the State of New York. His estate was administered in a foreign forum by fiduciaries appointed or acting on behalf of the estate in that same forum and not in New York. Simply put, as urged by defendants, there is absolutely *nothing* to connect the courts of this State with the foreign administration of the estate of Howard R. Hughes, Jr.

All other motions are denied.

Submit order accordingly.

DATED: Buffalo, New York
May 29, 1986

THEODORE S. KASLER
Theodore S. Kasler
Justice of Supreme Court